Filed 12/7/15 Baucom v. Superior Court CA4/2
Opinion on remand from Supreme Court

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

DANA BAUCOM, Petitioner, v. THE SUPERIOR COURT OF SAN BERNARDINO COUNTY, Respondent; THE PEOPLE, Real Party in Interest.	E060437 (Super.Ct.Nos. WHCSS1100203, CIVDS1312971 & MVI27346) OPINION

ORIGINAL PROCEEDINGS; petition for writ of mandate. Donald R. Alvarez, Judge. Petition granted.

Phyllis K. Morris, Public Defender, Stephan J. Willms, Deputy Public Defender, for Petitioner.

No appearance for Respondent.

Michael A. Ramos, District Attorney, Brent J. Schultze, Deputy District Attorney, for Real Party in Interest.

Following the issuance of our opinion filed on March 17, 2015, petitioner Dana Baucom sought review in the Supreme Court. That court granted review and transferred the case back to this court, with directions "to vacate its decision and reconsider the cause in light of *Johnson v. Department of Justice* (2015) 60 Cal.4th 871, 888 [(*Johnson*)]." As we had cited *Johnson* in our opinion, and had also cited and discussed the cases noted on page 888 which appeared relevant to this case (*Doe v. Harris* (2013) 57 Cal.4th 64; *In re Alva* (2004) 33 Cal.4th 254 (*Alva*); *People v. Castellanos* (1999) 21 Cal.4th 785 (*Castellanos)*), we were left to speculate about the intention behind this cryptic order. We have concluded that the Supreme Court intended that we consider whether cases decided after Baucom entered his plea, but which affected him by imposing upon him the requirement that he register as a sex offender (Pen. Code, § 290)[1] should not be applied to him as a matter of policy and equity. We are also mindful that the *Johnson* court apparently believes that retroactivity can be determined on a case-by-case basis. (*Johnson*, p. 889 at fn. 11.)

When the Supreme Court transfers a case back to the Court of Appeal with directions merely to reconsider, the transferee court is not obligated to change its mind even if the order cites a specific authority. (See, e.g., *In re Rozzo* (2009) 172 Cal.App.4th 40, 44; *People v. Poslof* (2005) 126 Cal.App.4th 92, 96 [Fourth Dist., Div. Two]; see also

[1] All subsequent statutory references are to the Penal Code.

Krueger v. Superior Court (1979) 89 Cal.App.3d 934, 939.) However, in this case the Supreme Court's order guides us to a result which, in all candor, we are not displeased to reach.[2]

In June 1991, petitioner Dana Baucom pleaded guilty to misdemeanor indecent exposure. (§ 314.) The record of conviction does not indicate that he was told he would be required to register as a sex offender, and he affirmatively denies that he was so informed. He also asserts that if he *had* been so informed, he would not have pleaded guilty.[3]

Petitioner also states that the registration requirement has never previously been enforced as a condition of parole, although he concedes in the petition that he has been in and out of prison ever since the subject conviction. However, when he was most recently paroled in December 2010 he was informed that he was required to register, and his conditions of parole included the restrictions mandated by statute.[4]

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[2] In our original opinion, we began by expressing the view that Baucom had no available legal remedy. We did so in part by noting that the Supreme Court itself had denied an earlier application to that court by citing *People v. Villa* (2009) 45 Cal.4th 1063, 1070-1071 (*Villa*) (sex offender registration is not "custody" so as to permit an application in habeas corpus). We also relied upon *People v. Kim* (2009) 45 Cal.4th 1078, 1105, which limited the reach of relief in *coram nobis*. We further concluded that mandamus was not available, rejecting the argument that such an approach, recognized in *People v. Picklesimer* (2010) 48 Cal.4th 330 (*Picklesimer)*, was appropriate here.

By its order, however, we think that the Supreme Court has implicitly indicated that relief is available. We therefore assume the point.

[3] There is no declaration supporting the petition. Instead, the record consists of multiple copies of defendant's multiple previous filings (see *infra*) and multiple copies of the exhibits to the multiple filings. This is not satisfactory.

[4] Such as residency restrictions and global positioning satellite (GPS) monitoring.

Petitioner then undertook efforts to invalidate the requirement. In June 2011 he filed a petition for writ of habeas corpus in the Superior Court of San Bernardino County. This was denied on the basis that it was untimely and sought relief not available by habeas corpus. Petitioner promptly filed a substantially identical petition in this court, which summarily denied it without comment.[5] He then petitioned the Supreme Court, which denied the petition with a citation to *Villa, supra,* 45 Cal.4th at pp. 1070-1071.[6]

Petitioner then obtained counsel and filed a petition for writ of mandate in the superior court, seeking the relief of vacating his conviction on the basis of inadequate advisals or directing the removal of his name from the "state sex offender registry." The People responded both that petitioner had failed to establish that he was not advised of the requirement, and that mandamus was unavailable. After extensive briefing on the issue of timeliness, inter alia, the superior court denied the petition.

Petitioner then returned to this court, which denied his petition after requesting an informal response from the People. The next stop was the Supreme Court again, and this time that court granted review and transferred the matter back to this court with directions to issue an order to show cause, which we have done. This order cited no authority and gave no clue as to that court's thinking about this case. However, the petition for review argued the registration requirement in light of *In re King* (1984) 157 Cal.App.3d 554

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[5] This court's notes reflect that our view was that neither habeas corpus nor *coram nobis* afforded an avenue for relief.

[6] The cited pages discuss what constitutes "in custody" for habeas corpus purposes, citing *In re Stier* (2007) 152 Cal.App.4th 63, 82-83, which held that the sex offender registration requirement was not "custody."

(*King*)—a question first raised by the district attorney opposing the petition filed in this court.

We now address the matter formally on the merits, with our initial attention on *King, supra,* 157 Cal.App.3d 554 and cases following that decision.

DISCUSSION

At all pertinent times, "indecent exposure" has been a listed registrable offense under sections 290 et seq. However, in 1984—seven years before petitioner entered his plea of guilty to violating section 314—the appellate court in *King, supra,* 157 Cal.App.3d 554 noted that sex offender registration was "punishment" for constitutional purposes, citing *In re Reed* (1983) 33 Cal.3d 914, 922. The court then held that the registration requirement constituted cruel and unusual punishment violating the Sixth Amendment for those individuals convicted of misdemeanor violations of section 314. (*King*, at p. 558.) Thus, at the time of petitioner's conviction, the trial court was bound by *King* under the principles of stare decisis. Indeed, a failure to follow *King* would have been in excess of the court's jurisdiction. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 454-455.)

It is true that after *King*, but before petitioner entered his plea, other courts adopted an expressly "as applied" or "case by case" approach for convictions for annoying or molesting a child under section 647.6 and its predecessor, former section 647a. (See *People v. DeBeque* (1989) 212 Cal.App.3d 241 (*DeBeque*); *People v. Monroe* (1985) 168

Cal.App.3d 1205 (*Monroe*).) *King*, however, remained the only directly on point authority.[7]

Thus, at the time of the petitioner's plea, the law of the state was that petitioner was not required to register under section 290.[8]

Furthermore, even if we agree with petitioner that cases like *DeBeque* created a "conflict" in the law requiring a case-by-case analysis, it is impossible to conceive of a less egregious offense than that committed by petitioner. He was parked on a dirt road in an unincorporated area near Victorville in the early evening, masturbating to pornographic magazines with his pants down, when a deputy sheriff stopped to investigate the vehicle. Petitioner told the officer that his wife did not like him to look at the magazines at home, so he had gone out in search of privacy. Although he was parked about two-tenths of a mile from a school, there is no indication in the record that any children were present in the area. In contrast, In *King, supra,* 157 Cal.App.3d 554, the defendant exposed his flaccid penis to two teen-aged girls in a parking lot. Although he

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[7] *After* Baucom's conviction, a second "King" case involving far more aggravated conduct (and a different defendant) took the approach that the "case by case" approach was also appropriate for indecent exposure. (*People v. King* (1993) 16 Cal.App.4th 567, 575-576 (*King II*).) Nevertheless, at the time of his plea the first *King* case was controlling and, as we have explained, no rational court could have found the registration requirement appropriate for petitioner when it was not in *King*.

[8] We do not agree with petitioner that *DeBeque, supra,* 212 Cal.App.3d 241 and *Monroe, supra,* 168 Cal.App.3d 1205), created a "conflict" in the law. *DeBeque* and *Monroe* dealt with violations of Penal Code section 647.6, a successor statue to section 647a. As noted by the court in *DeBeque*, " '[t]he offenses which constitute a violation of Penal Code section 647a [the predecessor to section 647.6], are more offensive than violations of section 647, subdivision (a), and section 314, subdivision (1).' " (*DeBeque*, at p. 250.)

did not speak to or approach them, his conduct was clearly more suggestive of a deviant nature than that of petitioner.

Thus, even if the court which accepted Baucom's plea thought it had some discretion to impose a registration requirement, no rational court could have found the requirement lawful for petitioner after *King*. And as we have noted, the record reflects no such requirement. In this respect we acknowledge that as the court noted in *Picklesimer*, *supra*, 48 Cal.4th 330, the registration requirement of section 290 is not part of a sentence and the statute is self-executing. (See *People v. Kennedy* (2011) 194 Cal.App.4th 1484, 1491; *In re Watford* (2010) 186 Cal.App.4th 684, 693.) However, we are also aware that trial courts commonly inform a convicted defendant of the requirement if the court believes it applies. In any event, the fact remains that the requirement *could not have been validly applied to Baucom when he entered his plea.* Hence, there was no duty on the part of the court to advise him about the registration requirement, and his plea was knowing, intelligent and voluntary in the constitutional sense.[9]

Of course, as the parties agree, times have changed, and neither *King* nor *Reed* upon which it relied are good law. The Supreme Court overruled *Reed* on the "punishment" point in *Alva*, *supra*, 33 Cal.4th at p. 292, and the court which decided the first *King* case reversed its position on the authority of *Alva* in *People v. Noriega* (2004)

[9] We reject any contention that trial courts have a pre-plea duty to advise defendants of potential changes in the law which might affect them. Such a duty would be impossible to define or limit.

124 Cal.App.4th 1334, 1338, 1342. Presumably it was this change in the law that prompted the authorities to determine that Baucom is, in fact, required to register.

It thus becomes apparent that petitioner's issue is not with the trial court and its advisals, but with the appellate courts. He is essentially in the same position as any defendant who is convicted (by plea or otherwise) of an offense which, years later, is added to section 290. It is well-established that such a defendant *is* subject to the requirement and there is no ex post facto violation. (See *Castellanos*, *supra* at p. 799; *Hatton v. Bonner* (9th Cir. 2003) 356 F.3d 955, 964.)[10]

Thus, there is no constitutional barrier to the imposition of the duty to register upon petitioner. *Johnson*, however, suggests that equitable principles may be taken into account in determining whether subsequent authority should be retroactively applied to a defendant. Considering the equities under the unique facts of this case, we note the following: (1) petitioner's conduct was virtually harmless and showed no inclination to criminal sexual deviance whatsoever; (2) a conviction at trial was by no means a foregone conclusion[11]; (3) his plea was clearly entered in ignorance of the possibility that

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[10] We do note that *Hatton v. Bonner*, *supra*, 356 F.3d 955 was decided prior to the adoption of "Jessica's Law" in 2006, which added the strict residency restrictions to section 3003.5.

[11] There would at the least have been a substantial question as to whether Baucom had a reasonable expectation of privacy in his car at the subject location. (Cf. *People v. Freeman* (1977) 66 Cal.App.3d 424, 431, disapproved on other grounds in *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 257, fn. 13 [no reasonable expectation of privacy in curtained booth in adult-only shop].)

he would be someday be required to register; and (4) there is nothing to indicate that his subsequent history over more than 20 years involves sex-related offenses or issues.

Accordingly, we conclude, acknowledging *Alva*, *King II,* and *Castellanos,* that neither equity nor public safety requires that Baucom be required to register as a sex offender. We grant the petition.

DISPOSITION

Let a peremptory writ of mandate issue directing the Superior Court of San Bernardino County to vacate its order denying the petition, and to enter a new order in the nature of mandamus, prohibition and/or declaratory relief[12] establishing that petitioner shall not be, and is not, required to register pursuant to section 290; further, that no analogous conditions of parole shall be imposed without evidence that they are appropriate under *People v. Lent* (1975) 15 Cal.3d 481, 486.

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KING
J.

We concur:

RAMIREZ
P. J.

MILLER
J.

[12] When a party seeks equitable relief by way of extraordinary writ, the court is empowered to grant relief in mandamus, prohibition, certiorari, or even declaratory relief; the form of the pleading is not dispositive and does not necessarily restrict the court's exercise of its powers. (See 8 Witkin, Cal. Procedure (5th ed. 2008) Extraordinary Writs, §§ 232-233, pp. 1141-1144.)